Supreme Court, U.S.
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No. 94-661

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

W.R. Grace & Co.-Conn.,

Petitioner,

v.

Maryland Casualty Company, Royal Indemnity Company, Aetna Casualty & Surety Company and Continental Casualty Company,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respondent Maryland Casualty Company's Motion to Strike Petitioner's Reply Brief

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November 23, 1994

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Respondent Maryland Casualty Company ("Maryland"), respectfully requests that this Court strike the Reply Brief submitted by Petitioner W.R. Grace & Co.-Conn. ("Grace") because it is premised entirely upon inappropriate *ex parte* communications with the Clerks of both the U.S. Court of Appeals for the Second Circuit and this Court which were clearly calculated to evade the 90-day time limit applicable to the filing of a petition for a writ of certiorari.

1. In its brief in opposition to Grace's certiorari petition, Maryland argues that Grace's petition is jurisdictionally defective because it was filed almost two months out-of-time. Maryland Brief in Opposition at 8-10. Under Rule 13.4 of this Court, an out-of-time certiorari petition must be dismissed for lack of jurisdiction.

2. As set forth in Maryland's brief in opposition, the Second Circuit panel that decided this case below entered its judgment on rehearing on May 16, 1994. Accordingly, Grace's petition for a writ of certiorari was due ninety days later -- on August 15, 1994. The petition was not filed, however, until October 13, 1994 -- almost two months out-of-time. Maryland Brief in Opposition at 8.

3. In its November 21, 1994 Reply Brief, Grace attempts to overcome this obvious jurisdictional defect by recharacterizing its June 13, 1994 request for *in banc* consideration as a second request for rehearing by the Second Circuit panel. In support of its position, Grace has included in its reply two letters that it submitted *ex parte* to the Clerk of this Court and the Clerk of the Second Circuit shortly before the August 15, 1994 deadline for filing its certiorari petition. Both letters memorialize *ex parte* communications made by Grace to the Court Clerks, which were clearly calculated to extend Grace's time to file a certiorari petition.

4. This Court should refuse to condone Grace's sharp practice. Grace's Reply Brief should be stricken because the *ex parte* communications upon which it relies go to the heart of a jurisdictional issue in the case, namely, the timeliness of Grace's petition for certiorari. Had Maryland known of these communications, it would have objected to Grace's attempt to obtain more time to file a certiorari petition by recharacterizing its pleading. Grace should not be permitted to rely upon self-serving, *ex parte* communications in these circumstances.

5. Further, Grace's *ex parte* communications with the Court Clerks constitute a clear attempt to circumvent this Court's rules regarding extensions of time for filing certiorari petitions. Under Rules 13.6 and 30.3 of this Court, an enlargement of time for the filing of a certiorari petition must be made by motion to the full Court. Grace failed to file any such motion, and instead engaged in *ex parte* communications to obtain an enlargement of time.

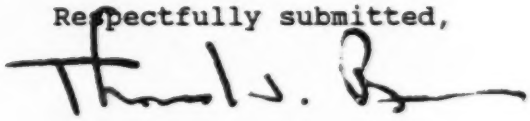
6. Grace's Reply Brief should also be stricken because it is founded upon a misrepresentation that finds no support in the Record. Grace has told this Court that its June 13, 1994 pleading was, from the beginning, a petition for rehearing with a suggestion for rehearing *in banc*. Grace Reply Brief at 3. It made the same representation to the Clerk of this Court. *Id.* at RA9. As set forth in Maryland's brief in opposition, however, Grace's pleading of June 13, 1994 was clearly a request for rehearing *in banc*. A

review of the pleading's contents as well as the subsequent representations of Grace's counsel confirm this. Maryland Brief in Opposition at 10, 5a.

7. Ironically, Grace asks this Court to "acknowledge Grace's timely and conscientious attempt to abide by this Court's rules, as evidenced by its good faith communications with both this Court and the Second Circuit clerks' offices . . . ." Grace Reply Brief at 5-6. Grace's so-called "good faith communications", however, were never served on Maryland nor, to Maryland's knowledge, any other party to the action.

For the reasons set forth above, Maryland respectfully requests that the Court strike Grace's Reply Brief.

Respectfully submitted,



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